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IN THE
COURT OF APPEALS OF INDIANA

COMMERCIAL SERVICES OF PERRY, INC., as successor in interest to the Federal Deposit Insurance Corporation, which was the successor in interest to the Industrial National Bank on all mortgages herein,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 45A03-0511-CV-536
All of the Unknown Parties having an interest in the ESTATE OF CEASARIO BONILLA, aka Cesario Bonilla, et al,	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable William E. Davis, Judge
Cause No. 45D02-0003-CP-100

September 6, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Appellant Commercial Services of Perry, Inc. ("Perry") appeals the Superior Court of Lake County's order granting Alicia Bonilla's ("Bonilla") motion for judgment on the evidence as it relates to a foreclosure action against her and her deceased husband Ceasario Bonilla ("Ceasario"). We are presented with the following dispositive issue, which we restate as: whether the trial court committed reversible error by granting Bonilla's motion for judgment on the evidence.

Concluding that the trial court committed reversible error when it granted Bonilla's motion for judgment on the evidence, we reverse and remand for proceedings consistent with this opinion.

Facts & Procedural History

This action involves a parcel of real estate located at 4310 Parrish Avenue in East Chicago, Indiana, particularly described as follows:

> Lot 25, Block 19, Resubdivision of Blocks 19 and 20, together with that part of Ivy Street between 143rd Street and 144th Street and North and South Alley in said Block 20, heretofore vacated, in Park Addition to Indiana Harbor, in the city of East Chicago, as recorded in the Plat thereof, recorded in Plat Book 19, page 28, in Lake County, Indiana.

Appellant's App. p. 78.

Ceasario owned a gasoline service station and was chairman and CEO of Industrial National Bank ("Industrial"). On March 16, 1984, Ceasario secured a $60,500 mortgage from Industrial on the property located at 4310 Parrish Avenue. The mortgage document includes Bonilla's name as co-mortgagor and bears the signatures of Ceasario and "Alicia Bonilla." Appellant's App. pp. 85-90. On April 20, 1985, Ceasario secured another mortgage from Industrial National Bank on the same property, in the amount of

$82,000. Similarly, the mortgage document includes Bonilla's name as co-mortgagor and bears the signatures of both Ceasario and "Alicia Bonilla." Appellant's App. pp. 93-98. Ceasario died on November 26, 1991. Appellant's App. p. 79.

The Federal Deposit Insurance Corporation ("FDIC") was the successor in interest to Industrial, and Perry is the current successor in interest to FDIC regarding the two mortgages secured on 4310 Parrish Avenue. Appellant's App. p. 102. The debt remains unpaid. Appellant's App. p. 78. On March 31, 2000, Perry filed a "Complaint for Foreclosure of Real Estate Mortgages and Money Judgement." Appellant's App. pp. 77-83. It includes the following:

> That the terms and conditions of said note and mortgage have been violated and a default has occurred in that no payments have been made on said Note and Mortgage for a period in excess of 60 days; and therefore, there is currently due and owing upon said Note and Mortgage the Principal Sum above stated plus interest at the rate above stated calculated to the present date plus attorney fees and court costs as well as reasonable expenses associated with the collection of this debt. All of which is currently due and owing to the Plaintiff.
>
> That it is believed that the Defendant, **Ceasario Bonilla, a/k/a Cesario Bonilla**, died subsequent to the execution of the documents herein and on or about the 26th day of November, 1991; however, to date, the Official Records of both the Recorder and the Auditor of Lake County, Indiana indicate that said property remains titled in the name of **Ceasario Bonilla a/k/a Cesario Bonilla and Alicia Bonnilla** [sic], husband and wife, and the Official Records of the Lake Circuit Court do <u>not</u> indicate that an estate was ever opened herein

Appellant's App. pp. 78-79 (emphasis in original).

A bench trial occurred on July 21, 2005. At that time, Bonilla filed a motion for judgment on the evidence and/or for dismissal of Perry's complaint. Appellant's App. p. 4. On August 4, 2005, the trial court generally granted Bonilla's motion for judgment on

the evidence, concluding that Perry "failed to introduce sufficient evidence to meet its burden of proof." Appellant's App. p. 26. On August 14, 2005, Perry filed a motion to correct errors. On October 13, 2005, the trial court denied Perry's motion and this appeal ensued. Additional facts will be provided as necessary.

Standard of Review

The standard of review for a challenge to a ruling on a motion for judgment on the evidence is the same as the standard governing the trial court in making its decision. Smith v. Baxter, 796 N.E.2d 242, 243 (Ind. 2003); Kirchoff v. Selby, 703 N.E.2d 644, 648 (Ind. 1998). Judgment on the evidence is appropriate "[w]here all or some of the issues … are not supported by sufficient evidence [.]" Ind. Trial Rule 50(A) (2006); see also Smith, 796 N.E.2d at 243. A reviewing court looks only to the evidence and the reasonable inferences drawn most favorable to the non-moving party, and the motion should be granted only where there is no substantial evidence supporting an essential issue in this case. Smith, 796 N.E.2d at 243; Kirchoff, 703 N.E.2d at 648. If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper. Smith, 796 N.E.2d at 243. Where the issue involves a question of law based on undisputed facts, the reviewing court is to determine the matter as a question of law in conjunction with the motion for judgment on the evidence, and to this extent, the standard of review is de novo. City of Hammond v. Cipich, 788 N.E.2d 1273, 1279 (Ind. Ct. App. 2003).

Discussion and Decision

Perry contends that the trial court erred as a matter of law when it granted Bonilla's motion for judgment on the evidence regarding the need to introduce the actual promissory notes underlying the mortgages. See Br. of Appellant at 24.

In Yanoff v. Muncy, 688 N.E.2d 1259 (Ind. 1997), our supreme court considered whether a plaintiff in a foreclosure action needs to produce the promissory note in order to recover the debt. There, Yanoff was unable to produce the promissory note underlying the debt owed to him. Id. at 1261-62. Regarding the establishment of the existence of the debt, the court relied on Indiana Code section 26-1-3.1-309, which provides, in pertinent part:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred;
> (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and
> (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (b) A person seeking reinforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, IC 26-1-3.1-308 applies to the case as if the person seeking enforcement had produced the instrument.

688 N.E.2d at 1262 (citing Ind. Code section 26-1-3.1-309 (2002)). Yanoff argued, and our supreme court agreed, that Yanoff "produced evidence of a promissory note or other written evidence of a debt sufficient to support his claim." Id. at 1262. After the debtor's testimony provided the court with the essential terms of the debt, such as the amount of

the original debt, the interest rate, the existence of a mortgage securing the debt, and the schedule of payments, the court held that such "evidence … is enough to prove both the existence of the promissory note underlying the mortgage and its essential terms." Id. at 1263.

Here, the trial court's order granting Bonilla's motion for judgment on the evidence included, in pertinent part: "The Court feels Plaintiff failed to meet its burden of proof at trial because Plaintiff failed to introduce the promissory notes, upon which its claim is based." Appellant's App. p. 13. This was an error of law. Pursuant to Indiana Code section 26-1-3.1-309 and our supreme court's holding in Yanoff, Perry is not required to present the promissory notes underlying the debts in question in order to proceed with its case.

Reversed and remanded for a new trial.

FRIEDLANDER, J., concurs.

BARNES, J., dissents with separate opinion.

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BARNES, Judge, dissenting

I respectfully dissent. The majority concludes the trial court erred in ruling that Perry was required to introduce the promissory notes underlying the mortgages in order to prove its case. Regardless of whether the majority is correct on that point, however, the trial court expressly stated that it was ruling in favor of Bonilla for two other, independent reasons. Those reasons, in my view, are sufficient to support the trial court's judgment in Bonilla's favor.

I first note that I disagree with the standard of review relied upon by the majority. It applies the standard of review for rulings on a motion for judgment on the evidence, which requires courts to look to the evidence and reasonable inferences drawn therefrom in a light most favorable to the non-moving party, i.e. in this case Perry. See Smith v. Baxter, 796 N.E.2d 242, 243 (Ind. 2003). The trial court in this case did not grant a motion for judgment on the evidence. This was a bench trial, and "[a] motion for judgment on the evidence under Indiana Trial Rule 50 is improper at a bench trial." Taflinger Farm v. Uhl, 815 N.E.2d 1015, 1017 n.2 (Ind. Ct. App. 2004). In a bench trial, a motion labeled as one for "judgment on the evidence" should be treated as a motion for involuntary dismissal under Indiana Trial Rule 41(B). Id. Bonilla's written motion to the trial court in fact did state that it sought "Judgment on the Evidence and/or . . . Dismissal of Plaintiff's Complaint." App. p. 21.

In reviewing a motion for involuntary dismissal, we do not reweigh the evidence or judge the credibility of the witnesses; rather we only consider the evidence most favorable to the trial court's judgment and the reasonable inferences therefrom. Taflinger Farm, 815 N.E.2d at 1017. "We will reverse the trial court only if the trial court's judgment is clearly erroneous." Id. at 1017-18. In this case, both parties had an opportunity to present all of the evidence they wished to present and rested their cases before the trial court ruled in Bonilla's favor. In other words, the trial court's judgment here was one on the merits in favor of Bonilla after all the evidence was presented. We should review it accordingly as we would any judgment after trial, giving great deference to the trial court's fact-finding.

One fact the trial court found, as stated in its ruling on Perry's motion to correct error, was that Bonilla did not sign the mortgages Perry sought to foreclose. There is evidence in the record to support such a finding. Bonilla repeatedly and vehemently denied in her testimony that she had any knowledge of these mortgages and denied having signed them. Perry wishes to rely on Indiana Code Section 33-42-2-6, which states, "The official certificate of a notary public, attested by the notary's seal, is presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts." Perry asserts that because Bonilla's signatures on the mortgages were notarized, she was required to present more evidence than merely her own denials, such as expert handwriting analysis, to overcome the presumption that they were her signatures.

Indiana Evidence Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

In this case, the notarization of Bonilla's signatures required her to present contrary evidence that she did not sign the mortgages. She did so through her testimony. Having presented contrary evidence, the issue of whether Bonilla signed the mortgages then became one for resolution by the trier of fact, here the trial court. See Mullins v. State, 646 N.E.2d 40, 50-51 (Ind. 1995). The trial court found Bonilla to be credible. We

should not second-guess that determination. Perry has not cited any authority for the proposition that some type of "super" evidence such as expert testimony is required to rebut a presumption, as opposed to "ordinary" evidence such as Bonilla's testimony. The trial court here could have found in Perry's favor on this point, but it did not have to do so.[1]

I also believe there is sufficient evidence in the record to support the trial court's finding, also recited in its ruling on the motion to correct error, that Bonilla did not ratify these mortgages taken out in her name by her husband without her foreknowledge. "Ratification" requires three showings: (1) an unauthorized act performed by an individual for and on behalf of another and not on account of the actor him- or herself; (2) knowledge of all material facts by the person to be charged with said unauthorized act; and (3) acceptance of the benefits of said unauthorized act by the person to be charged with the same. Wilcox Mfg. Group, Inc. v. Marketing Servs. of Indiana, Inc., 832 N.E.2d 559, 562-63 (Ind. Ct. App. 2005). Here, Bonilla admitted to a general awareness that her husband had borrowed money in some fashion in order to pay bills. However, she repeatedly professed ignorance that he had purportedly forged her name on any mortgages in order to obtain that money, until the first foreclosure suit was filed on them. Accepting Bonilla's testimony as true, as we must in deferring to the trial court's credibility determinations, Perry failed to establish that Bonilla had "knowledge of all

[1] To the extent Perry on appeal mentions Indiana Trial Rule 9.2(A) regarding pleading and proof of written instruments, I note that Perry made no argument to the trial court based on that rule. I would not entertain, for the first time on appeal, any argument that Bonilla's signatures on the mortgages were conclusively established based on a purported failure by Bonilla to comply with Rule 9.2(A). See McGill v. Ling, 801 N.E.2d 678, 687-88 (Ind. Ct. App. 2004), trans. denied.

material facts by the person to be charged with said unauthorized act" as needed to prove Bonilla's ratification of the mortgages. See id.

In sum, I believe there is sufficient evidence to support the trial court's judgment in favor of Bonilla. It is not necessary to address the issue of whether Perry had to introduce the promissory notes underlying the mortgages. I vote to affirm.